

## **SUMMARY OF PROPOSED AMENDMENTS TO THE ADMINISTRATIVE HEARING PROCEDURES**

### **A. Health and Safety Code Section 43028; Separate Procedures for Citations and Complaints:**

The primary issue considered by the staff in proposing amendments to the existing ARB administrative hearing procedures is the question of the appropriateness of the present procedures for handling violations subject to administrative penalties under section 43028 of the Health and Safety Code. As stated, in that section, the Legislature entrusted the Air Resources Board (ARB or Board) to adopt rules and regulations to impose and enforce administrative civil penalties for violations of Part 5 of the Health and Safety Code, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards. Under the legislative authorization, the ARB may assess administrative penalties up to a maximum of \$25,000 per day for each violation and a total penalty up to \$300,000. As stated above, subsumed within this broad charge is a myriad of different types and forms of violations and penalties that could be assessed.

Violations that may be alleged under section 43028 range from those that are relatively straightforward and clear-cut, over which no factual dispute exists, and involve small potential penalties, to violations involving complex factual and legal issues, significant amounts of technical, documentary and other forms of evidence, which often involve disputed discovery issues, and potentially large penalties. Additionally, violations covered under section 43028 involve noticeably different interests for both the alleged violator (the varying property interests at risk, as represented by potential penalties) and the ARB (cost to the agency's resources for compliance and enforcement). These varying interests must be weighed and balanced on a case-by-case bases under existing law.<sup>1</sup> To address these varying interests and the diversity of violations, in general, the ARB staff recommends that violations arising under Health and Safety Code section 43028 should be classified as violations for which either citations or more formal complaints could be issued. Accordingly, staff proposes that the hearing procedures set forth factors that the ARB should consider in making its determinations as to whether a citation or a complaint be issued. How a violation is classified would determine the applicable administrative hearing procedure to determine the merits of a contested action.

Under this proposal, the administrative hearing procedures for review of citations issued under the Roadside Inspection Program would be amended to cover citations issued under section 43028, as well as the Roadside Inspection Program. It is proposed that violations for which citations are issued be defined in the procedures as Class I violations. As stated, these would be violations that have been determined to be the more clear-cut, less complex, and less serious types of violations. The ARB's determination would be made on a case-by-case basis considering such factors as whether the violation is readily detectable, the risk and degree of environmental harm or injury to the public health and safety resulting from

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<sup>1</sup> See Mathews v. Eldridge, (1976) 424 U.S. 319, discussed infra.

the violation; the time effort, and expense required to correct the violation; the frequency and duration of the violation; and the importance of the violated requirement to the regulatory program. For example, a determination that a violation is a Class I violation would likely be made if a violation could be readily discerned; posed little risk of environmental harm; had not been identified in a previous enforcement action against the violator; had occurred only once or for a short period of time; or required little time, effort, or expense to remedy.

It is proposed that such violations be assessed a maximum penalty of \$5000 per violation, with a total penalty amount for any one citation to be no more than \$15,000. The penalty amounts are designed to be significant enough to deter violations and to ensure a high rate of compliance. On the other hand, the penalties assessed would, in general, be significantly lower than the amounts that could be assessed under the administrative complaint process or for violations that are judicially enforced.

In contrast, staff proposes that all violations arising under section 43028 of the Health and Safety Code that are not classified as Class I violations be subject to the proposed adjudicatory hearing procedures, Title 17, CCR, sections 60040.1, et seq. These violations would be subject to the issuance of complaints and would typically involve the more serious, complex compliance problems, involving, in general, significantly higher penalty assessments. These violations would be subject to penalties of up to \$25,000 per day for each violation, up to a maximum total penalty of \$300,000.

**B. The Adjudicatory Hearing Procedures Would Cover Complaints and Petitions for Review of Executive Officer Decisions:**

Staff believes that violations for which complaints are issued would likely involve issues of similar complexity to those that are presently considered in the review of executive officer decisions. Staff believes that such issues would likely involve similar types and amounts of evidence and involve similar discovery issues. Accordingly, the staff believes that a hearing procedure that provides the parties with greater access to discovery and provides the parties with more opportunity to prepare and refine their cases is necessary for both hearings to consider complaints and review executive officer decisions. This is in contrast to the recommended hearing procedures to consider citations which would provide for more expeditious time lines, limited rights to cross-examine adverse witnesses, and abbreviated discovery.

**C. Proposed Amendments to the Administrative Hearing Procedures for Review of Citations:**

As initially adopted, the administrative hearing procedures for review of citations issued under the Roadside Inspection Program were intended to be a streamlined hearing process that afforded all parties a fair and expeditious hearing. In keeping with these goals, staff proposes to amend the procedures to better define and outline the respective rights and

responsibilities of the hearing office, the parties, and the decision makers. A summary of the proposed amendments follows.

### Subarticle 1. General Provisions

§ 60075.1. Applicability: As explained above, the applicability of the procedures were broadened to include citations issued under section 43028 of the Health and Safety Code.

§ 60075.2. Definitions: A number of new terms were defined to provide specificity and clarity. The newly defined terms include:

(b)(1) “Administrative Record” refers to all documents and records that have been timely filed with the hearing office during the course of the hearing procedures, excluding any prohibited communications as defined in section 60040.13.

(b)(2) “Citation” refers to the administrative actions that can be issued pursuant to the Roadside Inspection Program and section 43028 of the Health and Safety Code.

(b)(3) “Class I violation” refers to the more straight forward, less complex, types of violations for which citations can be issued.

(b)(4) “Complainant” refers to the ARB, acting through its employees, as the party that has issued a citation for violations of the Roadside Inspection Program or section 43028 of the Health and Safety Code.

(b)(5) “Consent order” is a formal order issued by the hearing officer approving a settlement between the parties that resolves the underlying citation for which a hearing has been requested.

(b)(7) “Discovery” is specifically and narrowly defined to include the limited exchanging of documents by the parties and taking of depositions as provided in section 60075.27.

(b)(8) “Penalty” refers to the monetary amount that can be assessed against a respondent for a citation.

(b)(9) “Proceeding” refers to all matters that occur before a hearing officer during the administrative review of the citation.

(b)(10) “Respondent” refers to the party who has received a citation and has

requested an administrative hearing to consider the merits of the citation.

(b)(11) “Settlement Agreement” refers to the agreement between the parties that resolves the underlying citation.

The staff also proposes to amend the following subparagraphs:

(b)(12) “Hearing Office” to reference the amended section 44011.6 and section 43028 of the Health and Safety Code.

(b)(13) “Party” has been amended to clarify that parties to a citation hearing include the complainant and respondent.

Finally, staff is proposing that the definitions of “staff of the state board” and “state board” be deleted in that the former term is subsumed within the definition of complainant and the later term is defined elsewhere in the Health and Safety Code.

§ 60075.3. Time Limits; Computation of Time: Subparagraph (b) would be amended to eliminate confusion in determining the last date for filing papers or performing required duties. It is proposed that subparagraph (e) be amended to provide additional time to exercise or perform a right or act if created by a document or other writing that has been served by overnight delivery or fax transmission.

§ 60075.4. Service, Notice and Posting: The proposed amendments reflect that service may be completed by overnight delivery and fax transmission as well as by personal delivery and first-class mail.

§ 60075.5. Form of Pleadings: Nonsubstantive amendments have been proposed for purposes of clarity.

§ 60075.6. Limitations on Written Legal Arguments or Statements: This proposed new section provides the parties with notice of specific requirements regarding size of type and number of pages of pleadings that can be submitted to the hearing office during the proceedings.

§60075.7. Records of the State Board: Subparagraphs (b) and (c) have been added to provide greater guidance to the respondent who claims that certain documents, or portions thereof, should be protected from public disclosure.

§ 60075.8. Representation: The right to representation was previously set forth in section 60075.33. A party would continue to have the right to be represented by him or herself or by a representative of his or her choosing. The representative need not be an attorney; however representation would be at the party’s own expense. Additionally, the

amendments would make it clear that there would be no right to appointed counsel because of indigency. This latter provision is consistent with the APA, Government Code section 11509.

§ 60075.9. Interpreters and Other Forms of Accommodation: The existing provision that allows a party access to an interpreter, present section 60075.31 would be moved to this section. It is proposed that the provision be amended to specifically refer to the amended APA and to clarify the specific responsibilities of both the hearing office and the parties.

§ 60075.10. Motions: Former section 60075.18 has been deleted and replaced with detailed procedures that include time lines for the filing, responding to, and hearing of motions. The procedures closely parallel regulations adopted by the Office of Administrative Hearings.

## Subarticle 2. Issuance and Service of Citations

§ 60075.11. Determination of Class I Violations: This proposed new section defines violations for which citations may be issued and sets forth the criteria that would be considered by the ARB in determining a violation's classification. A Class I violation would include all citations issued under the Roadside Inspection Program and those violations that are considered to be the more clear-cut, less complex and less serious types of violations under section 43028 of the Health and Safety Code. In making the above determination, the ARB would consider, but would not be limited to considering, the following factors: (1) the ability to readily discern the violation; (2) the potential risk of injury to the public or environmental harm from the violation; (3) whether the violation is a single violation or has occurred in tandem with other violations; (4) the frequency and duration of the violation; (5) the time, effort, and expense required to correct the violation; (6) the cooperation of the respondent in detecting and correcting the violation; and (7) the compliance history of the respondent. The maximum penalty that could be assessed for a Class I violation would be \$5000 per day per violation, with a maximum penalty per citation being \$15,000.

§ 60075.12. Issuance and Service of Citations: This proposed section sets forth the procedures the ARB would follow in issuing and serving citations. Subparagraph (b) identifies the information that would be required to be included in the citations to provide full and fair notice to the party of the alleged violation and the right of the party to request a hearing, to be represented by a representative of his or her choice, and, if necessary, be provided with language assistance.

## Subarticle 3. Hearing Officers

§ 60075.13. Authority of Hearing Officers; Disqualification: This section, former section 60075.7, has been amended to provide additional clarity as to the duties and responsibilities of the hearing officer.

#### Subarticle 4. Ex Parte Communications

§ 60075.14. Prohibited Communications: Subarticle 4, sections 60075.14-60075.16, replaces former section 60075.9. The staff is proposing detailed amendments to the ex parte provision of the presently adopted procedures believing that it is important to clearly spell out the prohibitions and the obligations and responsibilities of the individual parties, the hearing officer, and the executive officer regarding off-the-record communications during the course of the proceedings. Section 60075.14, identifies the types of communications that cannot be shared between the hearing officer and a party to the proceedings, without notice and opportunity being provided to the other parties to allow them to hear and respond to the communication. In general, no oral or written communication, including pleading, letter, document, or other writing, may be provided by a party to a hearing officer unless the oral communication is made before all parties to the proceedings or unless copies of the subject documents have been served on the other parties. The proposed section allows the hearing officer to receive limited communications from employees of the ARB, who are not involved with the investigation or prosecution of the case, for the limited purpose of obtaining technical knowledge and advice to allow for completeness of the record.

§ 60075.15. Disclosure of Communication: This proposed section sets forth the procedures that the hearing officer would be required to follow if he or she receives a prohibited communication either prior to or during the course of the proceedings. The proposal also makes it clear that receipt of ex parte communications may be a cause for disqualification of the hearing officer.

§ 60075.16. Applicability to Executive Officer: This section would make it clear that the same rules against ex parte communications apply to the executive officer when a decision of the hearing officer is under reconsideration.

#### Subarticle 5. Initiating Proceeding to Contest a Citation

§ 60075.17. Filing a Request for Hearing: In subparagraph (a), staff proposes to amend former section 60075.10 to make the section applicable to citations issued under section 43028 of the Health and Safety Code and to make it clear that person's receiving citations have the option to pay the penalty in full in lieu of filing a request for hearing.

In subparagraph (b), the time for filing a request for hearing for review of a Roadside Inspection Program citation has been expanded from 30 to 45 days. This is to conform the regulation to amendments made to Health and Safety Code section 44011.6.

Staff proposes to add subparagraph (c) establishing a 30 day filing deadline for requesting a hearing for citations issued under Health and Safety Code section 43028. The 30 day period would encourage expeditious handling of these violations. Despite the express time period provided by the Legislature for Roadside Inspection Programs, the 30 day period

is reasonable when compared to many other administrative enforcement procedures. (e.g., APA, section 11506, “Within 15 days after service of the accusation, respondent may file . . . a notice of defense;” Water Code section 13320(a), “Within 30 days of any action or failure to act by a regional board . . . any aggrieved person may petition the board to review that action or failure to act.”)

Subparagraph (h) is proposed to be added to inform a respondent that he or she may only amend a request for hearing for good cause and at the discretion of the hearing officer.

§ 60075.18. Form of Request for Hearing: No substantive changes are proposed to former section 60075.11.

§ 60075.19. Issues for Hearing: No substantive changes are proposed to former section 60075.12.

§ 60075.20. Effect of Filing a Request for Hearing: Staff proposes to make minor changes to former section 60075.13 to reflect the broader applicability of the citation hearing procedures to citations issued under Health and Safety Code section 43028.

§ 60075.21. Response: No substantive changes to former section 60075.14 have been proposed.

#### Subarticle 6. Resolution of Proceeding Without Hearing

§ 60075.22. Withdrawal of Request for Hearing: The reference in former section 60075.15 to not being subject to review by any court or agency 30 days after service on the parties has been deleted. Under Health and Safety Code section 44011.6(m), if a party does not file a request for hearing on the citation in the time period provided, the citation is deemed a final order and not subject to review by the court or agency. By withdrawing a request for hearing the cited party has effectively placed itself in the same position as the party who failed to request a hearing in the first place.

§ 60075.23. Withdrawal of Citation: No substantive changes have been proposed to former section 60075.16.

§ 60075.24. Settlement Agreements and Consent Orders: This section is proposed to establish formal procedures to encourage the parties to settle the matters at issue short of litigation. To this end, the hearing office would make a hearing officer available to assist the parties. The hearing officer would not be the same hearing officer that has been assigned to hear the case, unless the parties expressly consent to provide otherwise. In the case where the parties could not reach settlement, all discussions regarding settlement would be privileged and not be made part of the record in the hearing on the merits.

§ 60075.25. Motions for Summary Determination of Issues: It is proposed that this section be added to replace former section 60075.17. This section would establish a process to allow the parties to file motions for summary judgment and summary adjudication of issues for which there is no dispute regarding material facts. Upon receipt of such motions and opposing papers, the hearing officer would determine whether there are any issues involving disputed facts. If there are none, the hearing officer would review legal arguments of the parties and decide the merit of those issues. Without sacrificing a party's right to a hearing to present evidence, this process would allow for more expeditious disposition of issues and cases, saving the time and resources of the parties and the hearing office.

#### Subarticle 7. Prehearing Conference, Discovery, and Subpoenas and Subpoenas Duces Tecum

§ 60075.26. Prehearing Conference: Staff proposes that this section be added to provide the hearing officer with discretion to hold prehearing conferences where necessary to assist the parties in simplifying or narrowing issues, stipulating to facts not in issue, or arranging times for the parties to exchange discovery. To ensure that the prehearing conferences do not cause unnecessary delay, the regulations would provide specific deadlines for the conducting of such hearings, and place specific obligations on the parties to prepare prehearing statements that include specific information that will allow for productive meetings.

§ 60075.27. Discovery: This new proposed section would replace former section 60075.20, Access to Documents. The new section would clarify and limit the types of documents that a party would be entitled to in a hearing to review the merits of a citation. In general, the parties would be allowed access to all documents that the opposing party intends to introduce at the hearing. In addition, the complainant would be entitled to financial documents from the respondent if the respondent has raised issues regarding its financial inability to pay a penalty or that it has not incurred economic benefit from the alleged violations in its response. The complainant would be entitled to such documents because such evidence would be at issue in the hearing and respondent may not intend to fully introduce all relevant evidence, which principally lies in its possession, into the record on the issues. As under the existing procedures, the right to take depositions shall be limited material witnesses who are either unable to attend or cannot be compelled to attend the hearing on the merits.

§ 60075.28. Proceeding to Compel Discovery: It is proposed that former section 60075.25 be amended to reflect recent amendments to Government Code section 11507.7 of the APA which provides that the hearing officer has authority to compel discovery.

§ 60075.29. Subpoena and Subpoena Duces Tecum: This section would replace existing sections 60075.8 and 60075.21, 60075.24, and 60075.36, all of which pertain to the issuance and enforcement of subpoenas and subpoenas duces tecum. The new section

conforms with the recent amendments to the APA, Government Code sections 11450.05 through 11450.50. Specifically, the new section sets forth the process for issuing and opposing subpoenas to compel witness attendance at hearings and the production of documents. It further sets forth the procedures for enforcement of subpoenas in state court against witnesses who refuse to comply with an issued subpoena. Finally, the section provides that subpoenaed witnesses are entitled to the same mileage and appearance fees as witnesses in state court actions, and that such payment should be paid by the party who has requested issuance of the subpoena.

#### Subarticle 8. Contempt and Sanction Orders

§ 60075.30. Contempt: This proposed new section is intended to provide the hearing officer with greater enforcement authority to ensure the credibility and viability of the hearing process and the underlying programs. The new section is intended to reflect the recently amended APA, Government Code sections 11455.10, et seq., as well as the previously existing statutes for enforcement that are set forth in Government Code sections 11186 through 11188. These provisions allow the hearing officer to proceed to state court for contempt proceedings against a party guilty of misconduct. It is further proposed that the hearing officers be given authority to assess reasonable expenses, including authorized representative fees, against a party, its representative, or both, whose bad faith actions or frivolous tactics have caused an opposing party to incur specific and identifiable unnecessary expenses. The ability to obtain sanctions against disobedient, disorderly, and disruptive participants in the hearing process should enable the hearing officer to maintain the integrity and decorum of the process, which should provide for more expeditious, efficient and fair hearings. This section would replace sections 60075.24, Judicial Enforcement, and 60075.36, Contempt, of the presently existing procedures.

#### Subarticle 9. Hearings

§ 60075.31. Time and Place of Hearing: For purposes of clarity and to eliminate duplication, staff proposes that existing sections 60075.26, Time and Place of Hearing, and 60075.32, Continuance of Hearing, be combined in this section, which covers scheduling of hearings.

§ 60075.32. Consolidation: No substantive changes to former section 60075.27 have been proposed.

§ 60075.33. Failure to Appear: No substantive changes to former section 60075.28 have been proposed.

§ 60075.34. Conduct of Hearing: The staff is proposing that former section 60075.29 be amended to clarify, through greater specificity, the respective rights and responsibilities of the parties and the authority and duties of the hearing officer in conducting the administrative

hearing.

§ 60075.35. Evidence: It is proposed that former section 60075.30 be amended to underscore the hearing officer's authority to exclude evidence that is unduly prejudicial. This authority is fundamental to guaranteeing a fair hearing, and is long-standing evidentiary rule.

§ 60075.36. Evidence by Affidavit or Declaration: It is proposed that this section be modified to more closely parallel Government Code section 11514 of the APA. Under the proposed language, the hearing officer would have discretion to allow an affidavit or declaration to be introduced into evidence even though the opposing party has not been provided an opportunity to cross-examine the witness. However, if allowed into evidence the affidavit or declaration would be given the same effect as other hearsay evidence. By providing the hearing officer with discretion, he or she can appropriately determine, after reviewing all of the circumstances, whether it is in the interest of justice to allow the evidence to be introduced.

§ 60075.37. Exclusion of Witnesses: It is proposed that nonsubstantive amendments be made to former section 60075.34 for purposes of clarity.

§ 60075.38. Oral Argument and Briefs: It is proposed that nonsubstantive amendments be made to former section 60075.35 for purposes of clarity.

#### Subarticle 10. Decisions After Hearing

§ 60075.39. Default Order: Staff proposes limited amendments to former section 60075.37 to require the complainant to make an offer of proof showing the appropriateness of the penalty amount. This amendment is consistent with judicial and administrative practice.

§ 60075.40. Penalty Assessment Criteria: The staff proposes that this new section be added to specifically set forth the criteria that the hearing officer should consider in assessing penalty orders. For Roadside Inspection Program citations, the penalty amounts are specifically set forth in Health and Safety Code section 44011.6 and in Title 13, CCR, sections 2180, et seq. For violations of Health and Safety Code section 43028, the proposed section restates the specific criteria set forth by the Legislature in section 43031 of the Health and Safety Code. The factors that the hearing officer is required to consider include: the extent of harm caused by the violation to public health and safety and to the environment; the nature and persistence of the violation; the compliance history of the respondent; the preventive efforts taken by the respondent; the innovative nature and the magnitude of the effort required to comply; the efforts to attain, or provide for compliance; and the cooperation of the respondent.

§ 60075.41. Order or Decision After Hearing: It is proposed that former section

60075.38 be amended to add that the hearing officer should be responsible for certifying the administrative record and providing a copy to the executive officer for review. This would conform the regulations to the existing practice of the hearing office.

§ 60075.42. Rehearing by Hearing Officer: No substantive changes to former section 60075.39 are proposed.

## Subarticle 11. Reconsideration by the Executive Officer

§ 60075.43. Reconsideration: On Motion of Executive Officer or by Request of Party: Staff is proposing only minor, mostly nonsubstantive, changes to former section 60075.41.

§ 60075.44. Reconsideration: Procedural Requirements: For purposes of clarity, it is proposed that all of the procedural requirements regarding requests for reconsideration be consolidated within this one section. Therefore, staff recommends to incorporate subparagraphs 60075.41(c)-(e) and 60075.43(a) and (b) of the existing procedures into section 60075.44. The substance of these subparagraphs have largely been kept intact, with several minor exceptions. Staff proposes to amend subparagraph 60075.44(a) to clarify that requests for reconsideration are limited to the review of only those issues that were raised before the hearing officer. Additionally, staff proposes the addition of a sixth ground for reconsideration -- that is, reconsideration may granted if an order or decision is contrary to applicable law or precedent. These amendments would be consistent with administrative jurisprudence and help ensure that all parties fully understand their rights and responsibilities under the reconsideration provisions of the procedures. Other nonsubstantive amendments are proposed for grammatical and format purposes.

§ 60075.45. Reconsideration: Orders and Decisions by the Executive Officer: The staff proposes that the regulation be reorganized to have a new section that consolidates existing provisions that pertain to the executive officer's authority in granting reconsideration. The revised organizational structure should provide greater clarity to the parties involved in the administrative hearing process.

Proposed subparagraph (a) would incorporate, with minor changes, existing section 60075.40, subparagraph (b), which provides for summary denials of requests for reconsideration if the executive officer fails to affirmatively act upon the request for reconsideration within 20 days of filing.

Subparagraph (b) of proposed section 60075.45, incorporates, again with minor changes, existing sections 60075.41(f), 60075.42, and 60075.44-60075.45, which, among other things, provide that the executive officer may grant stays of the hearing officer order or decision, affirm, rescind, or amend the order or decision of the hearing officer, and direct the taking of additional evidence.

Proposed subparagraph (c) requires that any decision of the executive officer on reconsideration must be in writing, and any modifications to the hearing officer decision or order must be supported by findings of fact and conclusions of law.

## Subarticle 12. Final Orders and Decisions

§60075.46. Final Order or Decision; Effective Date: The amendments propose to clarify when a order or decision becomes final and its effective date.

### Subarticle 13. Judicial Review

§60075.47. Judicial Review: Staff has proposed that existing section 60075.47 be amended to make clear that a party does not have the right to judicial review if it fails, in the first instance, to request a hearing to contest the issuance of a citation. Staff also proposes to add a section that allows a respondent, in a matter involving a citation issued under section 43028 of the Health and Safety Code, 30 days to seek judicial review. Although respondents contesting citations issued under the Roadside Inspection Program are provided by statute 60 days to file a request for judicial review, 30 days is the time period often provided in other administrative procedures. (See for example, Government Code section 11523.)

#### D. Proposed Amendments to the Administrative Hearing Procedures for Review of Complaints and Petitions for Review of Executive Officer Decisions:

As initially adopted in 1989, the Adjudicatory Hearing Procedures, Title 17, CCR, sections 60040, et seq. provided only for the review of certain executive officer decisions by the Board, itself, a panel of the Board, or an administrative law judge. At the time of adoption, it was anticipated that the decisions under review would, in general, involve the deprivation of significant property interests of the party petitioning for a hearing (e.g., orders directing manufacturers to recall and repair noncomplying motor vehicles; orders to revoke or suspend licenses of vehicle emission test laboratories). The adjudicatory hearing procedures were thus structured to provide appropriate due process to the stakeholder, guaranteeing the adversely affected party with notice of the executive officer's decision and an opportunity to contest the findings underlying the decision in a fair and impartial hearing.

Staff believes that the penalty amounts subject to recovery in administrative complaint causes of action (\$15,000-\$300,000) involve property interests comparable to those involved in petitions for review of executive officer decisions, and that the alleged respondents are entitled to due process protection equal to those that have been provided to petitioners under the existing adjudicatory hearing procedures. Accordingly, staff is proposing that the adjudicatory hearing procedures be broadened to include hearings to consider the merits of complaints issued by the ARB. To this end, the staff is proposing that the present adjudicatory procedures be repealed and that new hearing procedures cover both hearings to consider the merits of complaints and petitions for review of executive officer decisions.

To assist the parties of both complaint and petition for review hearings, the proposed procedures articulate, in detail, the rights, responsibilities, duties, and obligations of the parties themselves, the hearing office, and the adjudicators, i.e., the hearing officer, the executive officer, and the state board, itself. The latter two of which respectively have responsibility to review decisions of the hearing officer in complaint and petition for review hearings.

While many of the proposed procedures are generally applicable to both complaint and

petition for review hearings (Subarticle 1. General Provisions; Subarticle 2. Hearing Officers; Subarticle 3. Ex Parte Communications; Subarticle 6. Prehearing Procedures; Subarticle 7. Contempt and Sanctions; and Subarticle 8. Hearings.), other provisions (Subarticle 4. Issuance of and Response to Complaints; Subarticle 5. Filing and Initial Review of Petitions for Review and Executive Officer's Response; Subarticle 9. Decisions of the Hearing Officer; Subarticle 10. Reconsideration) either exclusively apply or separately reference different procedures for complaint and petition for review proceedings. For example, in a petition for review hearing, it is a decision of the executive officer that is under review; accordingly, the procedures provide that the Board itself retains ultimate authority to decide the issues under review. In contrast, in a complaint proceeding, the executive officer would be the final agency reviewer. Staff believes that it is appropriate to delegate to the executive officer final authority for review of complaint proceedings given the time and resource limitations of a part-time Board. This delegation is consistent with the existing delegation found in the present Roadside Inspection Program hearing procedures for Citations.

### 1. General Provisions

As explained above, the applicability of the proposed adjudicatory hearing procedures would be broadened to cover hearings reviewing the merits of complaints alleged by the ARB arising under section 43028 of the Health and Safety Code. The proposed procedures for complaint hearings would not cover the review of citations that are subject to review under Article 5, section 60075.1, et seq. Additionally, the proposed procedures would retain language from the present adjudicatory procedures that make it clear that the procedures do not apply to decisions of the executive officer that are related to the programs or actions of air pollution control or air quality management districts. Similarly, the proposed procedures would not be intended to apply to final orders and decisions issued by the executive officer under his or her authority to reconsider decisions in the administrative hearing for the review of complaints or citations.

For the purpose of adding specificity and clarity to the regulations, the proposed procedures would define a number of new terms that were not in the former adjudicatory hearing procedures. The newly defined terms include: administrative record, complainant, complaint, consent order, default, discovery, ex parte communication, party, petition, petitioner, proceeding, respondent, response, settlement agreement, and state board. Under the proposed procedure, one term has been deleted, "manufacturer working days," that was in the former procedures. The vagueness of the term has caused confusion for all parties in the scheduling of hearings and setting of deadlines for filing submissions. Additionally, the term creates unfair distinctions between manufacturers and other parties who appear in administrative hearings. The proposed procedures would provide specific language on how time limits will be computed and will provide the hearing officer with discretion to provide additional time for filings and the rescheduling of hearings if necessary and good cause exists.

All parties would be allowed to appear at all proceedings on their own or be

represented by counsel or other representative. The proposed procedures would allow the parties to file all necessary pleadings and motions relating to the proceedings before the hearing officer. Although the procedures would not establish specific format or content requirements for the filing of motions, the parties would be required to set forth clear and plain statements of all relief sought. Additionally, all pleadings and motions filed must be signed by the party or its representative, affirming that the contents of the documents are true and not submitted for the purpose of delay. The parties would be able to submit argument in support of and in opposition to all filed motions. The regulations would establish maximum page limits for filings (e.g., 12 pages for arguments in support of or opposition to motions; 3 pages for reply arguments). The original of all documents would be required to be filed with the hearing office with copies served on the other parties to the proceedings. As under the citation hearing procedures, service may be made by personal delivery, first-class mail, overnight delivery, or facsimile transmission.

The proposed procedures expressly provide that parties may request the assistance of interpreters and other reasonable accommodation. This provision parallels similar provisions that are included in the recently amended APA and provides guidance to the hearing office and the parties of their respective rights and responsibilities.

## 2. Authority and Disqualification of Hearing Officers

Existing section 60046 of Title 17, CCR, provides that hearings “may be held by the state board, by a committee of no fewer than two members of the state board, or by an administrative law judge from the Office of Administrative Hearings.” Under the new procedures, staff is proposing that initial proceedings be conducted before hearing officers of the Board. Under the proposed rules, the hearing officer would have broad authority to take all actions necessary for the full and fair adjudication of all issues raised by a request for hearing. The hearing officer must exercise this authority consistent with the specific provisions of the rules. Broad authority is necessary to enable the hearing officers to handle all contingencies that may arise during the course of an administrative proceeding.

In both hearings to review the merits of complaints and petitions for review of executive officer decisions, the hearing officer would conduct all prehearing conferences, hearings on motions and procedural issues, and hearings on the underlying merits; administer oaths; issue subpoenas; make all rulings and orders regarding motions and the introduction of evidence; call and examine witnesses; and make all necessary findings of fact based upon the evidence that has been introduced. At the conclusion of a complaint hearing, the hearing officer would issue a decision or order ruling on the merits of the allegations raised in the complaint. The decision or order would become final unless the executive officer elects to reconsider the matter upon receipt of a request of a party or on his or her own motion. In petition for review hearings, the hearing officer would issue a proposed decision or order on the merits, which the Board itself would review and ultimately decide.

The staff believes that having hearings initially held before hearing officers would provide the most efficient and effective process. The hearing officers are experienced

attorneys with specific expertise in air quality law and the administrative hearing process. A hearing officer

would be required to disqualify himself or herself from any case in which he or she cannot accord a fair or impartial hearing and that any party may make such a request to the hearing officer prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier.

### 3. Ex Parte Communications

As in the administrative hearing procedures for review of citations, the staff is proposing inclusion of this subarticle believing that it is important to clearly spell out the prohibitions and the obligations and responsibilities of the individual parties, the hearing officer, and reviewing authorities regarding off-the-record communications during the course of a proceeding. Section 60040.13, identifies the types of communications that cannot be shared between the hearing officer and one party to the proceedings without notice and opportunity being provided to other parties to hear and respond to the communication. In general, no oral or written communication, including pleading, letter, document, or other writing, may be provided by a party to a hearing officer unless the oral communication is made before all parties to the proceedings or unless copies of the subject documents have been served on the other parties. The proposed section allows the hearing officer to receive limited communications with employees of the ARB, who are not involved with the investigation or prosecution of the case, for the limited purpose of obtaining technical knowledge and advice to allow for completeness of the record.

This proposed procedure would set forth the procedures that the hearing officer is to follow if he or she receives a prohibited communication either prior to or during the course of the proceedings. The proposal also makes it clear that receipt of ex parte communications may be a cause for disqualification of the hearing officer. The same requirements and obligations would also apply to the executive officer when reviewing a request for reconsideration of an issued decision and the state board when reviewing a proposed decision of the hearing officer in a petition for review hearing.

### 4. Issuance of and Response to Complaints

Pursuant to section 43028 of the Health and Safety Code, the ARB has authority to issue administrative complaints for all violations arising under its fuel's program for which the penalty amount does not exceed \$25,000 per day per violation and for which the total penalty does not exceed \$300,000. Under these proposed regulations and the amendments to Title 17, CCR, section 60075.1, et seq., complaints would not be issued for those violations that are determined to be Class I violations for which a citation has been issued. Such violations would be subject to the citation hearing process.

The proposed procedures would require that the ARB include specific information within each complaint that is issued to assure that the respondent has adequate notice of the alleged violations and the facts constituting the charges against it. Among the information that a complaint would require is the name of the parties who are alleged to have committed

the violation, the facts surrounding the violation, the proposed penalty, reference to the hearing procedures, and notice that the alleged violator has 30 days from the date of service of the complaint to respond to the complaint and request a hearing. Additionally, the procedures would require that respondent be provided with notice that it may represent him or herself or retain a representative at his or her own expense, and, if necessary, may obtain an interpreter for language assistance. After issuing the complaint, the ARB would have authority, either unilaterally or by stipulation with the respondent, to withdrawal or amend the complaint.

After receipt of the complaint, the respondent may elect to admit or deny each allegation and accusation of the complaint and raise new matters by way of affirmative defenses. Under the proposed procedures, the respondent would be required to file his or her response within 30 days after service of the complaint, but that date may be extended for 30 additional days by stipulation with the complainant or up to an additional 60 days by the hearing officer if good cause exists and the complainant would not be prejudiced. The issues for hearing would be limited to the issues raised in the complaint and response. Under the proposed procedures, if the alleged violator failed to respond within the time provided, a default would be entered against that person who would be found to have effectively waived his right or her right to contest the matters alleged in the complaint.

#### 5. Filing and Initial Review of Petitions of Executive Officer Decisions

These provisions closely parallel the existing adjudicatory hearing procedures and provide that a party aggrieved by an executive officer decision may file a petition for review of that decision with the clerk of the board within 30 days after receipt of the decision. This time may be extended for good cause. A petition would be required to include specific information, including a verified statement of facts, the reasons for which review is being requested, and the relief that petitioner is seeking. After a petition is filed, the petition would be referred to the hearing office for initial review by a hearing officer. Formerly, the initial review was conducted by the chairperson of the state board. The proposed change is being recommended to better utilize the agency's resources. The initial review would be limited to determining if the executive officer's decision involved a matter for which a hearing is required by law. All decisions involving recalls under Health and Safety Code section 43105 and revocations or suspensions of licenses for vehicle emission test laboratories would require a hearing. A finding by the hearing officer that a petition is not subject to hearing may, upon request of the petitioner, be reconsidered by the Board itself, under proposed section 60040.45.

As with the existing procedures, the proposed hearing procedures would require that all petitions for review of executive officer decisions relating to motor vehicle recalls and revocation of vehicle emission test laboratory licenses be automatically stayed upon receipt of a petition for review. The hearing officer would have discretion to issue a stay regarding other matters covered by a petition for review. In making his or her decision, the hearing officer would balance the effects of a stay on the public health, safety and welfare against the harm that may be suffered by the party if a stay is not granted. The decision of the hearing

officer would be subject to

reconsideration by the board under section 60040.45. Within 10 days after the hearing officer issues its determination that a hearing is required by law, the executive officer would be required to respond to the petition and provide rationale and facts in support of the challenged decision.

## 6. Prehearing Procedures

Under the proposed procedures, the hearing office would schedule all hearings to consider the merits of complaints within 30 days of the receipt of the response to a complaint. The hearing office would similarly schedule all hearings to consider petition for review within 30 days of the receipt of a petition of an executive officer decision relating to motor vehicles' recalls and revocation of vehicle emissions test laboratory licenses. In matters relating to other executive officer decisions, the hearing office would schedule the hearings within 30 days of the determination that a hearing is required by law. In both types of cases, the hearing office would endeavor that all hearings be scheduled to be heard within 180 days from the date of issuance of the complaint or receipt of the petition for review. Although the hearing date may be postponed beyond that time for good cause and in the interest of justice, it is not expected that this would occur often. It is in the interest of the parties, as well as the public's interest, that hearings occur as expeditiously as possible. Even in the more complicated cases that involve significant discovery, 180 days should, in most instances, afford sufficient time for the parties to prepare their case.

The prehearing procedures providing for consolidation, prehearing conferences, and settlement conferences, closely parallel provisions of the amended APA and other state administrative hearing procedures. Under the prehearing procedures, the hearing officer would have discretion, in the interest of resources, time, and justice, to consolidate either cases involving the same parties or involving common issues of law and fact among several different parties. In so evaluating the benefits of the latter form of consolidation, the hearing officer would be required to make certain that no party is prejudiced by the decision.

The hearing officer would also be given discretion to hold prehearing conferences where necessary to assist the parties in simplifying or narrowing issues, stipulating to facts not in issue, or arranging times for the parties to exchange discovery. To ensure that the prehearing conferences do not cause unnecessary delay, the regulations would provide specific deadlines for the conducting of such hearings, and place specific obligations on the parties to prepare prehearing statements that include specific information that will allow for productive meetings.

The proposed procedures would also include formal procedures for conducting settlement conferences to encourage the parties to settle the matters at issue short of litigation. To this end, the hearing office would make a hearing officer available to assist the parties. The assisting hearing officer would not be the same hearing officer that has previously been assigned to hear the case, unless the parties expressly make such a request. In the case where the parties could not reach settlement, all discussions regarding settlement would be

privileged and not be made part of the record in the hearing on the merits.

Under the proposed procedures, discovery would primarily be limited to access to (1) the names and addresses of witnesses (other than confidential informants) to the events at issue, and (2) writings, statements, or things that are relevant to the issues for hearing. For the most part, inspection or investigative reports that pertain to the subject matter of the proceeding and are prepared by, or on behalf of, any party would not be subject to discovery. Discovery of such records would only be permitted as to the names and addresses of witnesses or persons (other than confidential informants) having personal knowledge of the underlying issues of the hearing; recordings of matters perceived by the investigator (as opposed to his or her analysis or conclusions) during the course of the investigation; and statements by persons that pertain to the subject matter of the proceedings and which are otherwise admissible. Nothing in the section would authorize the inspection or copying of any writing or thing which is otherwise privileged from disclosure by law or made confidential or protected as the attorney's work product.

The proposed regulations would provide for only limited use of depositions. The parties, however, may stipulate between themselves to allow for greater use of depositions and written interrogatories. Without a stipulation, a party would be limited to petitioning the hearing officer to request that it be able to depose only material witnesses who are unable or cannot be compelled to attend the administrative hearing. The discovery provisions being proposed closely parallel the APA and would ensure that all parties have the opportunity to properly prepare and evaluate their case for hearing. At the same time, the provisions would establish strict time lines for requesting discovery and limiting the scope of discovery which should encourage timely preparation and expeditious adjudication of the merits of the case.

Under the proposal, the hearing officer would have authority to compel discovery. This provision parallels Government Code section 11507.7 of the APA, and provides that a party who has been refused or denied discovery may petition the hearing officer for relief by way of a motion to compel discovery. After the opposing party has had the opportunity to respond to the motion and a hearing has been held, the hearing officer would issue a decision granting or denying the motion. The hearing officer's order would be subject to judicial review pursuant to section 60040.49

It is proposed that subpoenas and subpoenas duces tecum be issued in accordance with the procedures set forth in article 11, chapter 4.5 of the APA, Government Code section 11450.05- 11450.50. Specifically, the new section would set forth the process for issuing and opposing subpoenas to compel third-party witness attendance at hearings, or if stipulated to, at depositions, and the production of documents. The section also provides that subpoenaed witnesses would be entitled to the same mileage and appearance fees as witnesses in state court actions, and that such payment would be required to be paid by the party who had requested issuance of the subpoena. The ability to subpoena witnesses and obtain documents from nonparties would help to assure that all parties are provided equal access to material evidence at the administrative hearing. The ability to compel the attendance of witnesses

would ensure their appearance and that all material evidence is presented. The subpoena and enforcement authority gives affect to the parties' right to call and question witnesses.

It is further proposed that 10 days prior to the scheduled hearing date, each party would provide a list of, and information on, the witnesses they propose to have testify. The provision would guard against any party suffering any undue, last second surprise, or prejudice from the appearance of unscheduled witnesses. To this end, the hearing officer would have the discretion to prohibit the testimony of any witness who was not on the prehearing witness list.

The proposed prehearing procedures would allow a party to file a motion for summary determination of those issues in which there is no dispute regarding material facts. If the hearing officer agrees that there are no disputed facts, he or she may decide the case prior to hearing based on the legal arguments submitted by the parties. This process would allow for expedited resolution of certain issues or the case as a whole, saving the time and resources of the parties and the hearing office.

#### 7. Contempt and Sanctions

The proposed procedures would provide the hearing officer with authority to seek contempt and sanction orders. This authority would allow the hearing officer to properly enforce issued orders and help ensure the credibility and viability of the hearing process and ultimately the underlying programs. These provisions are intended to mirror the recently amended APA, Government Code sections 11455.10, et seq., as well the enforcement provisions found at Government Code sections 11186 through 11188. These provisions allow the hearing officer to proceed to state court for contempt proceedings against a party guilty of misconduct.

It is further proposed that the hearing officers be given authority to assess reasonable expenses, including representation fees, against a party, its representative, or both, whose bad faith actions or frivolous tactics have caused an opposing party to incur specific and identifiable unnecessary expenses. The ability to obtain sanctions against disobedient, disorderly, and disruptive participants in the hearing process should enable the hearing officer to maintain the integrity and decorum of the process, which should provide for more expeditious, efficient and fair hearings.

#### 8. Hearings

In addition to the enforcement provisions set forth above, the hearing officer would have authority to take a hearing off calendar or enter a default order against a party who, having received notice of the hearing, fails to appear at a scheduled hearing. These provisions would encourage attendance at all scheduled hearings, avoid unnecessary delay, and ensure expedited disposition of cases.

Under the proposal, each party at a complaint and petition for review hearing would be provided with basic rights to guarantee that it has full and fair opportunity to present evidence and argument to fully represent its position before the hearing officer. Although hearings would be

conducted in English, any party may ask for the assistance of interpreters, pursuant to section 60040.10. In conducting fair and impartial hearings that assure due process, all parties would have the right to call, examine, and cross-examine witnesses and present relevant evidence.

In a complaint proceeding, the burden of proof and of going forward would be on the ARB, the complainant. The respondent would have the right to examine, respond to, or rebut the allegations of the complaint and any proffered evidence and material. Subject to the hearing officer's discretion, the parties would respectively have the right to offer rebuttal evidence after their initial presentation of their case-in-chief.

In a petition for review hearing, the petitioner would have the initial burden of showing that the executive officer acted without or in excess of his or her authority in issuing the decision under review, or that the decision is not supported by facts or applicable law. The executive officer would then have the right to examine, respond to, or rebut any contentions raised by petitioner, and may offer any documents, testimony, or other evidence which bears on relevant issues. At the close of the executive officer's presentation of evidence, the hearing officer would have the discretion to allow the parties to present rebuttal evidence.

Under the proposed procedures, the hearing officer would govern the conduct of the hearing, make decisions on the admissibility of evidence and take whatever actions are necessary for a full and fair adjudication of the matter. Under his or her authority, the hearing officer would be able to limit the number of witnesses and the introduction of irrelevant, immaterial, unduly repetitious or unreliable evidence; require authentication of written evidence; call and examine witnesses on his or her own motion; and admit into evidence any relevant and material evidence in the interest of securing a complete record.

All hearings would be recorded electronically, however, to conserve the resources of the agency, transcripts would be prepared only when ordered by the hearing officer to permit a full and fair review of the case or specifically requested by one of the parties or other interested person(s). If not ordered by the hearing officer, the parties or person(s) requesting a copy of the transcript shall bear the cost of production.

At the hearing, all oral testimony would be required to be given under oath or affirmation. As discussed above, evidence could be admitted in the form of affidavits or declarations without cross examination if consented to, or the right is waived by, the opposing party. The administrative hearing would not be required to follow the technical rules of evidence that apply in judicial courts of law. Evidence of the sort a reasonable person would typically rely on in the conduct of serious affairs would be allowed. Hearsay evidence may be introduced, but generally would not be sufficient in itself to support a finding. The rules of privilege would apply to the extent provided by statute. These relaxed rules of evidence would enable non-lawyers, including parties appearing on behalf of themselves, to fully participate in the hearings, without prejudice.



Under the proposed procedures, a party would be able to seek to introduce an affidavit or declaration into evidence and have it treated the same as oral testimony, if prior to hearing, it provides a copy of the affidavit or declaration to the opposing party and the opposing party does not request to cross-examine the affiant or declarant within seven days of receipt of the document. However, if the opposing party requests the right to cross-examine, it should be afforded such an opportunity. If it is not, the hearing officer would have discretion whether to allow the document into evidence, based in the interest of justice in providing a full and fair hearing. If the hearing officer allows the document in, the evidence would only be given the same effect as other hearsay evidence. This section follows Government Code section 11514 of the APA, and parallels a similar provision in Title 13, CCR, section 60075.1, et seq., administrative hearing procedures to review citations.

To assure full and fair hearings, the hearing officer would be authorized to take official notice of generally accepted technical and scientific matters or the official acts of the Board. To this end, the Evidence Code, sections 450, et seq., regarding official notice would also apply to proceedings under these rules. As part of this process, any party opposed to the official notice would be afforded the opportunity to oppose the introduction of such evidence. The hearing officer would also be authorized to admit into evidence trade secret or confidential information. If confidential evidence is offered into evidence, the hearing officer would be required to first consider the evidence in camera and issue a supplemental decision or order if necessary to protect confidentiality of the evidence.

Upon the request of a party, the hearing officer would have discretion to exclude a prospective witness from the hearing room prior to his or her testimony. The hearing officer's determination would balance the potential for the testimony to be influenced by the proceedings against the right of the witness to attend a public hearing. This provision is consistent with Evidence Code section 777.

Under the proposed hearing procedures, the hearing officer would have discretion as to whether oral and/or written closing arguments are appropriate. In making the determination, the hearing officer would be required to consider whether the argument would be productive and not unreasonably delay the disposition of the proceedings.

## 9. Decisions of the Hearing Officer

### a. Default Order:

As indicated above, under the proposed procedures, the hearing officer may order a party to be in default if it fails to take actions required under the procedures to further the case towards resolution. Among other things, a default could be entered against a respondent for failing to file a response to a complaint within 30 days after issuance of the complaint, or against any party who fails to appear at a scheduled hearing after receipt of notice. A default by the respondent in a complaint proceeding would result in an order being issued against the

respondent finding that the party has violated the statutes, rules, or regulations alleged in the complaint and that it is subject to penalties for such violations. A default by the petitioner in a petition for review hearing would result in a recommended order that the petition be dismissed. A default by the state board in a complaint proceeding would result in the dismissal of the complaint with prejudice. In a petition for review hearing, a default by the staff of the state board would result in a recommended decision to the Board that the executive officer decision under review be revoked. After entry of default, the hearing officer would be able to reconsider his or her decision upon a showing of good cause by the defaulting parties. Additionally, a default order would be a decision or order after hearing which is subject to reconsideration by either the executive officer or the Board itself and ultimately judicial review.

b. Order or Decision of the Hearing Officer After a Complaint Hearing; Rehearing

The proposed procedures would require that within a reasonable period of time after the conclusion of a complaint hearing, the hearing officer would issue his or her order or decision on the merits. The hearing officer would make every effort to issue the order or decision within 60 days of the close of the hearing or as expeditiously as possible thereafter. An order or decision of the hearing officer would be required to be in writing, summarize the evidence received and relied upon, make findings of fact relevant to the issues for hearing, and set forth conclusions of law based upon those facts. The hearing office would be required to serve a copy of the order or decision on each party or representative together with a statement informing the parties of their right to request a rehearing by the hearing officer or to petition the executive officer for reconsideration. Within five days of the decision or order, a party could request, or the hearing officer on his or her own motion could order that the matters under consideration be reheard because of mistake of law or fact. This procedure would allow the hearing officer to correct an erroneous decision where the error is brought to his or her attention shortly after the hearing. However, a party would not have to exhaust this option to formally request that the executive officer reconsider the matter.

c. Proposed Order or Decision After Petition for Review Hearing; Rehearing; Decision of the Board:

At the conclusion of a petition for review hearing, the hearing officer would issue a proposed order or decision on the merits. The Board itself would retain authority to issue the final order or decision after reviewing the hearing officer's proposal. Similar to complaint proceedings, the hearing officer would be required to issue the proposed order or decision on the merits within a reasonable period of time after the close of hearing. The hearing officer would endeavor to issue the proposed order or decision within 60 days of the close of the hearing or as expeditiously as possible thereafter. As with a decision of a hearing officer in a complaint proceeding, the proposed order or decision would be required to be in writing, summarize the evidence received and relied upon, make findings of fact relevant to the issues

for hearing, and set forth conclusions of law based upon those facts. The hearing office would serve a copy of the proposed order or decision on each party or representative together with a statement informing the parties of their right to request a rehearing by the hearing officer because of a mistake of law or fact. If no request for rehearing is ordered, the hearing officer would certify the administrative record and forward a copy of the decision to the clerk of the board.

Within 60 days of receipt of the proposed order or decision, the board would conduct a public hearing to consider the proposed order or decision, and may take any of the following actions: (1) adopt the proposed order or decision in its entirety, (2) make technical or minor changes to the proposal, (3) refer the matter back to the hearing officer for the taking of additional evidence, or (4) issue its own written decision, based on the administrative record, and any evidence presented to the Board during the public hearing.

#### 10. Reconsideration

While the order or decision of the hearing officer in a complaint proceeding would generally become the final order or decision of the agency, the executive officer would be authorized to reconsider a hearing officer order or decision on his or her own motion or at the request of a party. A party would have 20 days from the date of issuance of the hearing officer order or decision or, if applicable, from the date of the order or decision after rehearing to file a request for reconsideration. Similarly, in a petition for review hearing, any party may within 20 days of issuance of the Board's order or decision, file a request that the Board reconsider the order or decision.

The executive officer or the Board, respectively, may order reconsideration of the order or decision for the following reasons: the hearing officer, in a complaint proceeding, or the Board, in a petition for review hearing, has exceeded its authority in issuing the order or decision or have misapplied applicable law and case precedent; the order or decision was procured by fraud; the order or decision is not supported by the evidence or the findings of fact; or new, material evidence has been discovered that was previously unavailable at the time of the hearing. Upon reconsideration, the executive officer or the Board, as applicable, could affirm, rescind, or amend the findings of fact or the conclusions of law of the order or decision that is under reconsideration. If additional evidence is necessary for the executive officer or the Board to act, the executive officer or the Board may reopen the record itself to take new evidence or may refer the matter back to the hearing officer.

Any request for reconsideration would be deemed to have been denied if it has not been acted upon by the executive officer or the Board within 20 days of service. This should be sufficient time for the executive officer or the Board to make a preliminary determination regarding reconsideration while preventing the use of requests for reconsideration to be employed as a delay tactic.



## 11. Final Order or Decision; Judicial Review

If reconsideration is denied, the underlying order or decision of the hearing officer in a complaint proceeding and the Board in a petition for review hearing would become the final order or decision of the agency. If reconsideration is granted, the order or decision that is subsequently issued respectively by the executive officer or the Board would become the final order or decision of the agency. If the order or decision is adverse to the respondent in a complaint proceeding or to the petitioner in a petition for review hearing, the party could seek judicial review by administrative mandamus pursuant to section 1094.5 of the Code of Civil Procedure within 30 days after the decision is mailed.

Under section 1094.5(b), the respondent in a complaint proceeding or the petitioner in a petition for review hearing may petition the court as to whether the ARB has proceeded without, or in excess of its, jurisdiction; conducted a fair trial, or committed prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. In determining abuse of discretion, the court will determine whether the findings are supported by substantial evidence in light of the whole record. Code of Civil Procedure section 1094.5(c).